No. [redacted] 20

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IN THE

Supreme Court of the United States

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners.

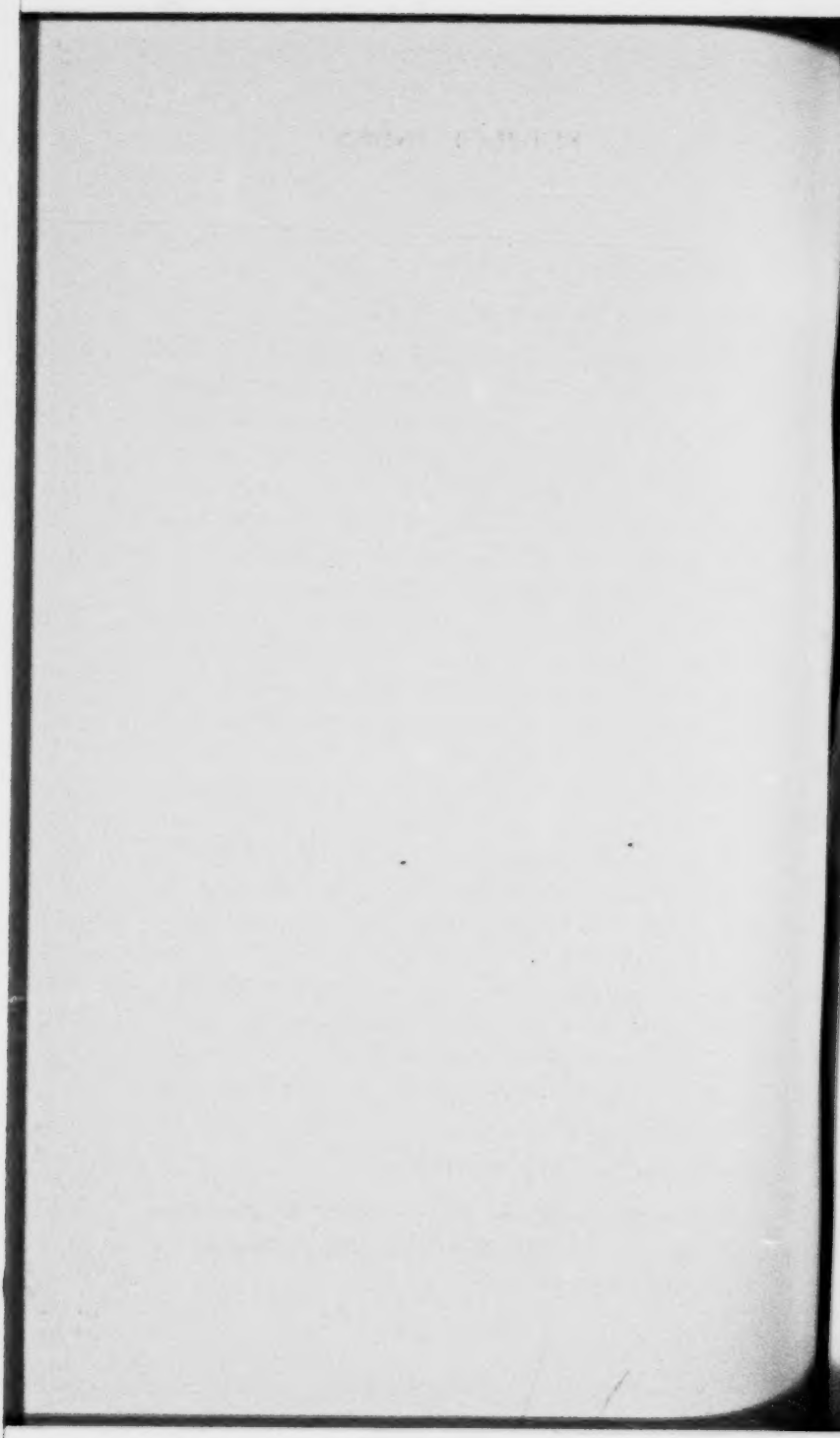
—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.



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IN THE

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EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Earle & Stoddart, Inc., et als., for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of the Matter Involved.

1. The libel was filed in admiralty by the petitioners, owners of cargo shipped at New York on the British steamship "Galileo", against her owner as a common carrier for cargo damage. The courts below have found concurrently that a dangerous fire hazard existed on shipboard at the time of sailing from the loading port; that such hazard constituted serious unseaworthiness; that the danger and unseaworthiness were easily observable be-

fore the vessel sailed by even an unskilled person and were in fact observed by a stevedore and eight coal trimmers who had no authority from the respondent to remedy the dangerous condition; and that the cargo damage resulted "inevitably" from that unseaworthiness on sailing. The Courts have further found that the unseaworthiness resulted from negligence of the chief engineer while the "Galileo" was at the loading port and consisted in failing to heed warnings from the stevedore and coal trimmers that the coal already in the bunker was "very hot", and in permitting the stevedores to load a new lot of respondent's coal on top of the very hot coal already in the bunker. The respondent's managing officers had peremptorily ordered that the new lot of coal be loaded as bunkers for use on another vessel of the owners after arrival at destination. The captain of the "Galileo" admitted that the dangerous condition in which the ship sailed could not be remedied at sea (R., p. 85).

2. The defense, sustained by the Circuit Court of Appeals (R., pp. 785-790), was that, as matter of law on these undisputed facts, the shipowner was exonerated from all liability because of the Fire Statute (R. S. 4282, U. S. Code, tit. 46, sec. 182). It held that Congress, by the Fire Statute, intended to repeal and did repeal, in so far as fire is concerned, the well-settled rule of maritime law that the minimum possible duty of a shipowner, by contract or otherwise, is to supply a vessel which at the time of sailing from the loading port is seaworthy and safe from fire and other perils to the extent that use of ordinary care can make her so. The Court further held that a shipowner may, without subjecting himself to any liability, permit his vessel to sail from her loading port with a dangerous fire hazard

within her, although the hazard is irremediable by the crew at sea after sailing, and is observable, before sailing, by an unskilled person looking at the vessel. This defense was sustained notwithstanding the circumstance that the shipowner by personal written contract had warranted that "the owners" (R., p. 698) of the vessel would exercise due diligence to make her seaworthy at the time she was sent to sea from the loading port. (See *infra*, paragraph 10, p. 4.) The Court specifically refused (R., p. 789) to follow a contrary ruling in the Fifth Circuit in *The Etna Maru*, 20 Fed. (2nd) 143, affirmed 33 Fed. (2nd) 232. The rule in *The Etna Maru* is in accord with the rule prevailing in the Fourth, First, Third, and Ninth Circuits, and with the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, *Pendleton* v. *Benner Line*, 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

7. The foregoing concurrent findings of fact by the Courts below are amply supported by the uncontradicted evidence introduced by the respondent itself.

8. In August, 1926, the respondent, through its New York agents, Ellerman's Wilson Line, Inc., 26 Broadway, New York City (R., p. 698), whose stock was altogether owned by respondent (R., pp. 423 and 432), held itself out at New York by "advertising in the papers" (R., p. 423) as a common carrier of goods on its steamship "Galileo" from New York to Hull, England (R., p. 698), and endeavored "to book all the cargo we can for her and we get it alongside the steamer" (R., p. 423). The bills of lading as matter of usual practice were issued and signed by the Ellerman's Wilson Line (R., p. 423).

9. On August 27, 1926, at New York, various persons, the petitioners here, shipped goods on board the "Galileo"

and received from the respondent negotiable bills of lading. The bills of lading covering the major portion of the cargo were signed as follows:

> "Ellerman's Wilson Line, Limited,
> By Ellerman's Wilson Line, New York, Inc.,
> as Agents." (R. 698.)

10. By the terms of all the bills of lading, the respondent acknowledged receipt of the goods "in apparent good order and condition" (R., p. 698) and promised that the goods would "be transported by the *good* steamship 'Galileo'" (R., p. 698) and would "be delivered in like good order and condition at the port of Hull" (R., p. 698). The implied absolute warranty of seaworthiness, and the express warranty that the "Galileo" was "good", were limited only by the provision that the owners were not to be liable for losses from unseaworthiness "provided *the owners* have exercised due diligence to make the steamer seaworthy" (R., p. 698). The bills of lading provided that:

> "The carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default * * * by fire or flood, from any cause or wheresoever occurring; * * * or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, *provided the owners* have exercised *due diligence to make the steamer seaworthy*" (R., p. 698). (Italics ours.)

The bills of lading also contained the following provision:

> "It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes." (R. 698.)

There is nothing in this clause to indicate an intention to modify the warranty. The warranty is therefore not modified by it. *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655, and *The Malcolm Baxter, Jr.*, 277 U. S. 323. Indeed the Fire Statute, which is Section 4282, R. S., is not mentioned at all in the clause.

11. Before the "Galileo" sailed from New York, a cable was received by respondent's New York agents (R., p. 424) from the managing owners of the respondent at Hull, England, peremptorily directing (R., pp. 424-425) that 850 tons of coal belonging to the respondent be also loaded on the "Galileo" as bunkers for use on another of respondent's vessels, the "Francisco", to which the coal would be transferred after arrival at Hull (R., pp. 424-425). The cable in full was as follows (R., p. 713, Respondent's Exhibit D):

> "HULL 9 AUGUST 20, 1926
> LCO WILSONLYN NY
> 'GALILEO' LOAD EIGHTFIFTY BUNKERS
> TRANSFERENCE 'FRANCISCO' ".

12. The respondent's New York Agents employed stevedores, the Jarka Company of New York, to load the coal. Magarelli, the foreman stevedore of the Jarka Company, proceeded on the coal boat to the "Galileo" with a gang of eight coal trimmers (R., pp. 416-417). When the trimmers went into the bunkers on the "Galileo", they discovered that the old bunker coal, remaining from a previous voyage was so "very hot" that it "burned their boots" and made one of the trimmers so sick that he "fell out" (R., p. 417). The heat and gas in the bunkers were so bad that none of the trimmers could work for more than 10 or 15 minutes at a time (R., p. 417). The trimmers accordingly protested to Magarelli that "they can't work no more" (R., p. 417) and

"started to kick and holler, it was too warm down there" (R., p. 417); that "The coal, it is too warm" (R., p. 417). Magarelli while on the coal boat alongside the "Galileo", could "smell the gas over the side, there was gas come on the coal boat" (R., p. 419). Magarelli on receiving the protest "went down in the hatch" himself (R., p. 417), and found that "the coal was too warm" (R., p. 417), and that "the men could stay there only 10 or 15 minutes to work" (R., p. 417).

13. Magarelli then went immediately to see Oxtoby, the chief engineer of the "Galileo", who was on board her (R., p. 418), and protested: "The coal is very hot" (R., p. 418);—the coal that is already in the bunkers (R., p. 418). "Chief, my men be kicking there down below, it is warm, and they con't stay down below" (R., p. 418). The chief engineer didn't pay any attention to Magarelli's protest (R., p. 418), and "they went on loading the coal" (R., p. 418).

14. Oxtoby, the chief engineer of the "Galileo" testified that before the "Galileo" sailed from New York Magarelli "the foreman came to me" (R. 392); "The foreman of the coal trimmers, and he said that the coal was hot" (R., p. 392); and "He said it was burning the men's boots" (R., p. 392). Oxtoby ignored the protest (R., p. 392).

15. Within six hours after the "Galileo" sailed from New York, bound for Hull, the heating reached the ignition point and fire broke out in the coal in the compartment where Magarelli's men had been working (R., p. 85). The fire was so serious that after a consultation of officers (R., p. 303), without waiting for a reply to an urgent wireless message from her master to the Ellerman's Wilson Line, Inc. at New York, informing the Line of the fire and suggesting return to port and dis-

charging or shifting of coal (R., pp. 85-86, 304), it was decided to proceed back to New York (R., p. 304), where "assistance could be obtained to shift to get at the seat of fire which meant shifting from 250 to 300 tons" (R., p. 85), and which shortly afterwards resulted in the sinking of the vessel and her cargo (R., pp. 85-87, 69).

16. The decision in this case of the Circuit Court of Appeals for the Second Circuit is *concededly* (R., p. 789, Opinion C. C. A. 2) in conflict with the decision in the Fifth Circuit in:

The Etna Maru (20 Fed. 2nd 143, S. D. Tex.; affirmed 33 Fed. 2nd 232, C. C. A. 5).

17. The decision is also in conflict with the following decisions of the Circuit Courts of Appeals for the Fourth, First, Ninth and Third Circuits:

C. C. A. 4:

Chesapeake Lighterage Co. v. *Baltimore Co.*, 40 Fed. 2nd 394 (C. C. A. 4);
The Pinellas (*Charbonnier* v. *U. S.*), 45 Fed. 2nd 174 (C. C. A. 4);
The Poleric (*Porter* v. *Bank Line, Ltd.*), 25 Fed. 2nd 843 (C. C. A. 4).

C. C. A. 1:

Christopher v. *Grueby* (*The Commonwealth*), 40 Fed. 2nd 8 (C. C. A. 1).

C. C. A. 9:

Bethlehem Co. v. *Gutradt Co.*, 10 Fed. 2nd 769 (C. C. A. 9);
The Annie Faxon, 75 Fed. 312 (C. C. A. 9);
Navigazione Libera v. *Garcia* (*The Filtre*), 30 Fed. 2nd 62 (C. C. A. 9).

C. C. A. 3:

The Katie (*Tucker Co.* v. *Southwork Co.*), 24 Fed. 2nd 410 (C. C. A.).

18. The decision in this case is further in conflict with the decisions of this Court in:

The Malcolm Baxter, Jr., 277 U. S. 323;
Pendleton v. *Benner Line*, 246 U. S. 353;
Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

Importance of the Question Involved.

The decision of the Circuit Court of Appeals rests on the following fundamental proposition:

> "Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy is therefore immaterial unless it is within the owner's privity or knowledge" (R., pp. 788, 789).

The Circuit Court of Appeals further holds that the breach of a warranty of seaworthiness, whether the warranty be absolute, or reduced to that of using due diligence to make the vessel seaworthy, does not constitute neglect of the shipowner or privity or knowledge.

The doctrine thus announced by the Circuit Court of Appeals is in direct conflict with the decision of *The Malcolm Baxter, Jr., supra; Pendleton* v. *Benner Line, supra,* and *Luckenbach* v. *McCahan Sugar Company, supra,* cited under paragraph 18 of this petition, and *The Etna Maru,* 20 Fed. (2d) 143, affirmed 33 Fed. (2d) 232 (C. C. A. 5)—see paragraph 16 of this petition. The doctrine as announced by the Circuit Court of Appeals in the present case relieves the shipowner of all duty

to make his ship seaworthy in respect of a fire, and goes further and discharges the shipowner of all obligation to owners of cargo when the loss to cargo has been caused by a breach of the warranty of seaworthiness in the shipowner's contract, notwithstanding the fact that the unseaworthiness was so obvious that it could have been observed before sailing from the loading port by an unskilled person, and was in fact observed by nine unskilled persons, as the Courts below have concurrently found.

It is noteworthy, in illustration of the importance of the decision, that it has been selected by the editors of Lloyd's List Law Reports in England as one of the few opinions of American courts which they have quoted in full. Many shipping journals in England and America have published summaries of the decision and articles relating to it.

If the decision is allowed to stand a shipowner has every inducement to remain away from his ship while in the loading port and also to keep his shore agents and representatives from going on board. This Court held in *Pendleton* v. *Benner Line*, 246 U. S. 353, that, if the shipowner had gone on board and had not seen the unseaworthy condition which any unskilled observer could see, he would have been personally negligent for not discovering it, and was, therefore, outside any protection afforded by the Limitation Act. The Court in the present case in effect encourages the shipowner not to go on board while in the loading port and thus subject himself to the possibility of seeing what it is his duty to provide against. In other words, the Court below in the present case undermines the effect of this Court's decision in the *Benner Line* case—*Pendleton* v. *Benner Line*, 246 U. S. 353—(and in *The Malcolm Baxter, Jr.*, 277 U. S.

323; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139; and *Capitol Transp. Co.* v. *Cambria Steel Co.*, 249 U. S. 323), by denying absolutely that a shipowner is bound to perform his duty as "owner", viz.: to use reasonable care to make his vessel seaworthy up to the time he sends her to sea from the loading port. The general importance and far-reaching consequences of the unprecedented decision of the Court below in the present case are obvious when it is realized that it makes it to shipowners' financial interest to refrain from going on board their vessels, and to keep their shore agents away from their ships for fear they might discover, or that they may be charged with having reasonable means of discovering, a dangerous condition which any unskilled observer could see. The decision, therefore, directly tends to increase the danger while at sea to all persons and goods on ships leaving United States ports. It is a direct repudiation of the duty of shipowners as settled by the maritime law from ancient times. That duty is that either personally or by their shore agents or inspectors, the shipowner must make such an ordinary inspection of the vessel at the time of sailing from the loading port as any ordinarily prudent unskilled man would make of his vessel before sending her to sea on a long voyage.

WHEREFORE, the petitioners pray that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled in that Court "Earle & Stoddart, Inc., et als, libellant-appellants, against Ellerman's Wilson Line, Ltd., Owner of Steamship Galileo, respondent-appellee", 1931 Term, No. 97, and that the decree of said Circuit Court of

Appeals entered on the 28th day of December, 1931, be reversed, and for such other relief in the premises as may be just.

Dated, March 17, 1932.

EARLE & STODDART, INC.,
By H. B. EARLE,
Treasurer,
on its own behalf and on behalf of the other owners of cargo on the S.S. "Galileo", petitioners herein.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

Certificate of Counsel.

We hereby certify that the foregoing petition in our opinion is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Dated, March 17, 1932.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

IN THE

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EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinions below are officially reported as:

Earle & Stoddart v. *Ellerman's Wilson Line,* 45 Fed. 2nd 231 (S. D. N. Y.; R., p. 726);
Earle & Stoddart v. *Ellerman's Wilson Line,* 54 Fed. 2nd 913 (C. C. A. 2, R., p. 785);
42 Lloyds' List Law Reports 19.

Jurisdiction of This Court.

The jurisdiction of this Court is under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, tit. 28, sec. 347), and on Article III, section 2, clause 1, of the Constitution of the United States. The proceeding is a libel in admiralty by cargo owners against the owner of a vessel which was a common carrier for breach of the contract of affreightment.

The present petition seeks a review of the action of the Circuit Court of Appeals for the Second Circuit in dismissing the libel.

Statement of the Case.

The facts are summarized in the petition.

I.

The decision in the present case is, as the Court recognizes in its opinion (R. 789), in conflict with the decision in the Fifth Circuit in the "Etna Maru", 20 Fed. 2d. 143 (S. D. Tex.) affirmed 33 Fed. 2d. 232 (C. C. A. 5), where it was held that breach by the owners of a vessel of a warranty that the owners have exercised due diligence to make the steamer seaworthy deprives them of the protection of the fire statute (R. S. 4282, U. S. Code, tit. 46, sec. 182). In the present case the Circuit Court of Appeals has found that the unseaworthiness caused the fire, and that the unseaworthiness could have been discovered before sailing by the exercise of due diligence. Both the Circuit Court of Appeals for the Fifth Circuit and the District Court in the *Etna Maru* case held that those findings established neglect of the vessel owner and therefore deprived it of the protection of the fire statute.

The Circuit Court of Appeals for the Second Circuit in its opinion in the present case refused (R. 789) to "follow" the decision in the Fifth Circuit in *The Etna Maru,* 20 Fed. 2nd 143 (S. D. Tex.), affirmed 33 Fed. 2nd 232 (C. C. A. 5), saying (R. 789):

> "In so far as *The Etna Maru,* 20 F. (2d) 143 (S.D. Tex.), affirmed upon another ground in 33 F. (2d) 232 (C. C. A. 5) supports the rule contended for by the libellants, we cannot follow it."

The Court in the present case was mistaken in stating in its opinion that the District Court's decision in *The Etna Maru* was "affirmed upon another ground" (R. 789). The Court does not state what the "another ground" was, and it is plain from the opinions of the two Courts in *The Etna Maru* case that it was non-existent.

In *The Etna Maru* case both the Circuit Court of Appeals and the District Court held that the breach of the warranty of seaworthiness which caused the fire, established neglect of the vessel owner, the courts finding that the unseaworthiness could have been discovered by the exercise of due diligence. In that case the Circuit Court of Appeals for the Fifth Circuit said (33 Fed. 2nd at pp. 234 and 235):

> "It is certain that *the unseaworthiness of the vessel* at the beginning of the voyage *amounted to negligence of either itself or its employees.* There is nothing in the statute to bar a recovery against the ship. *Richardson* v. *Harmon,* 222 U. S. 96; *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334; The Malcolm Baxter, Jr., 277 U. S. 323." (Italics ours.)

And again the Court said (33 Fed. 2nd at p. 233):

> "While there is some conflict in the testimony, a clear preponderance supports the conclusions reached by the District Court."

The District Court in *The Etna Maru* case, speaking through Judge Hutcheson (now Judge of the United States Circuit Court of Appeals for the Fifth Circuit), said (20 Fed. 2nd at p. 146):

> "I agree with libellant in his contention, that a shipowner must make his vessel seaworthy before the beginning of the voyage; that this duty is non-delegable, and *if it is not seaworthy* on ac-

count of conditions existing before the beginning of the voyage and fire springs from that condition, *there is a neglect on the part of the owner* within the meaning of the fire statute, for which he must account."

Ia.

Conflict With Fourth Circuit.

The decision in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Chesapeake Lighterage Co.* v. *Baltimore Co.*, 40 Fed. (2nd) 394). In that case the master negligently permitted the charterers to load a large quantity of copper bars on his vessel which was not in seaworthy condition to receive them, with the result that she soon sank. The shipowner introduced evidence that he had no personal knowledge of the unseaworthiness or the negligent loading, and therefore asked for exemption from liability. The Circuit Court of Appeals for the Fourth Circuit, however, said (40 Fed. 2nd at p. 395):

> "For authorities on the law that controls the question as to the privity or knowledge of the owner, reference to *The Virginia* (D.C.) 264 F. 986, *Sorenson et al.* v. *Boston Insurance Co. of Boston, Mass.*, 20 F. (2d) 640, and *Bank Line* v. *Porter* (*The Poleric*) 25 F. (2d) 843, will show the rule as laid down by this court. Under these decisions the judge below rightly held that the superintendent of *the appellant company could, by proper inspection, have discovered the unseaworthiness of the barge,* and that the *appellant was therefore chargeable with knowledge of such unseaworthiness.*
>
> The decree of the court below is accordingly affirmed." (Italics ours.)

In *Charbonnier* v. *United States* (*The Pinellas*), 45

Fed. 2nd 174, the Circuit Court of Appeals for the Fourth Circuit said (at p. 177):

> "The owners contend that even if the ship was unseaworthy, the evidence does not show that they were personally negligent in this respect, because the ship was built by an experienced and competent builder and was passed by official surveyors of the American Bureau of Shipping as being seaworthy in all respects; and it is pointed out that in such well-known cases as *Walker* v. *Transportation Co.*, 3 Wall. 150, 153, 18 L. Ed. 172, and *The Strathdon* (D.C.) 89 F. 374, it was held that the neglect which deprives the shipowner of the protection of the Fire Statute is his personal neglect and not merely the neglect of his officers or agents in charge of the ship. But in each of these cases, there was no showing that the ship was unseaworthy at the beginning. The negligent conduct complained of took place during the course of the voyage."

The Court then, referring to the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, said it was not disposed to criticize the rule in that case.

In *The Poleric* (*Porter* v. *Bank Line, Ltd.*), 25 Fed. (2nd) 843, cert. denied 278 U. S. 623, the Circuit Court of Appeals for the Fourth Circuit found that the fire in that case was due to the unseaworthiness of the vessel at the beginning of her voyage from Calcutta to New York. The Court said (at p. 846):

> "It is contended on behalf of the respondent that it is exempted from liability by the fire statute. This statute is set out in full in *The Poleric, supra.* On this point we agree with the learned judge below, when he says: 'In view, however, of the decision which I have reached on the subject of the seaworthiness of the "Poleric" at the commencement of the voyage, what is said above may after all be wholly academic since, if the ship was not seaworthy, and this fact was due to the per-

sonal negligence of the owner, and the failure in that respect was the cause of the loss, that of itself would make the statute inoperative. *The Virginia* (D. C.) 264 F. 986; *Hines* v. *Butler* (C. C. A.) 278 F. 877; *The Elizabeth Dantzler* (D. C.) 263 F. 596; *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1914), 1 K. B. 419-424 (1915) A. C. 705.'

The fire statute does not apply where the owner has contributed to the loss by his own neglect. *Walker* v. *Transportation Co.*, 3 Wall. 150, 18 L. Ed. 172. Here the owner, by its neglect in allowing the 'Poleric' to sail from Calcutta in an unseaworthy condition, did contribute to the loss."

Conflict With the First Circuit.

The decision in this case is in conflict with the decision in *Christopher* v. *Grueby* (*The Commonwealth*), 40 Fed. 2nd 8 (C. C. A. 1), that a shipowner is chargeable with personal knowledge, or reasonable means of knowledge, of any "dangerous fire hazard" existing on his vessel at the time of sailing which an unskilled "average man" would observe if interested enough to look around the vessel before she sailed. The fire in that case was caused by the negligence of the vessel's engineer in spilling gasoline (p. 13 of 40 Fed. 2nd) while pouring it from a can into the reservoir of the lighting plant, thus permitting it to become ignited. The "lighting plant" on the vessel was not supplied with pipes for gasoline. Its reservoir, therefore, had to be filled by pouring gasoline from a can. The shipowner claimed the protection of the Fire and Limitation Statute; denied personal knowledge; and alleged that anyway it was a technical matter for experts and not for an unskilled shipowner. The Circuit Court of Appeals for the First Circuit held, however, that the shipowner must be presumed as matter of law to have personal knowledge

or means of knowledge of "dangerous fire hazards" existing on his own vessel before sailing, and of the fact "that gasoline was likely to be spilled" (p. 11 of 40 Fed. 2nd), saying:

> "It did not require the knowledge of an expert to appreciate this. The average man who gave the situation any consideration would understand and appreciate it. * * * It is true that the 'owners' duty did not require them to provide a vessel of fireproof construction, or to adopt the latest appliances, or the best safety devices'; but it did require them to provide reasonably safe appliances and equipment that would render those appliances reasonably safe for the uses to which they were to be put in the place where installed and the condition there existing."

And at page 12 of 40 Fed. 2nd, the Circuit Court of Appeals for the First Circuit said:

> "Was the fire caused by the negligence of the owners or any of them in failing to provide and equip a seaworthy vessel?
>
> The duty of ship owners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work."

And at page 13 of 40 Fed. 2nd, the Court further said:

> "The District Court found that the fire was due to the negligence of the engineer and not from any defective condition of the machinery or equipment on board the vessel. *But it does not follow that because the engineer may have been negligent that the owners are free from fault.*" (Italics ours.)

Conflict With the Ninth Circuit.

The decision in this case is in conflict with the decision in *Navigazione Libera Triestina* v. *Garcia* (*The Feltre*), 30 Fed. 2nd 62 (C. C. A. 9). In that case, as here, the shipowner inserted in his bill of lading a clause exempting him from the usual implied absolute warranty of seaworthiness and limiting his duty and promise to the exercise of due diligence to make the vessel seaworthy at the time of sailing from the loading port.

The Court held that the unseaworthiness would "have been discovered on inspection" by her owner (30 Fed. 2nd at p. 64), and that he was therefore liable.

In *The Annie Faxon*, 75 Fed. 312, at 314-315, the Circuit Court of Appeals for the Ninth Circuit said:

> "We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, *unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person.*"

And, again, at page 315 of 75 Fed. the Court said:

> "When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded of *the inspector of a boiler.* It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern *injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert.*"

Conflict With the Third Circuit.

In *Tucker Stevedoring Co.* v. *Southwark Manufacturing Co.* (*The Katie*), 24 Fed. (2d) 410, the Circuit Court of Appeals for the Third Circuit, in considering whether the owners of the "Katie" could limit their liability when the "Katie" was unseaworthy and the owners had no knowledge of such unseaworthiness, held that because of the implied warranty of seaworthiness, the limitation statute did not apply. In the course of its opinion the Court said:

> "The present contract being for lighterage, we think there was an implied contract that the lighters would be seaworthy. In that regard we agree with the holding of *The Loyal* (C. C. A.), 204 F. 931, where it was said: 'The vessel owner had a written contract with the cargo owner for lighterage services covering an extended period. This lighterage contract implied an obligation that the lighters to be furnished under it should be seaworthy. * * * The implied contract that the lighter was seaworthy, attached to the * * * contract, was, in our opinion, just as much the personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract.'"

That Court held that for this reason the limitation should be denied, citing the following language from *Pendleton* v. *Benner Line*, 246 U. S. 356:

> "We are not disposed to disturb the very strong and deliberate intimation of *Richardson* v. *Harmon* in their application to the present case. * * * Unless the petitioner can be discharged from his contract altogether, he must answer for the breach, whether he was to blame for it or not."

This Court held in *Pendleton* v. *Benner Line*, 246 U. S. 353, that unseaworthiness displaces the contractual and

statutory exemptions of the shipowner in so far as damages flow from the unseaworthiness.

In *The Wildcroft,* 201 U. S. 378, this Court held that the maritime law since time immemorial, entirely independently of the Harter Act, requires a shipowner, as a condition to a claim that a peril caused a loss, to establish that he used ordinary care, before the alleged peril was encountered, to supply a vessel which was reasonably safe or protected against that peril to the extent required by the maritime law. In that case this Court said (201 U. S. at pp. 388-389):

> "The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner."

The Court below relied largely upon certain English decisions, which, upon analysis, can be shown to be inapplicable. It is sufficient at this time to point out that the English law as stated by the Court is not in accord with the decisions of this Court in *The Malcolm Baxter, Jr.,* 277 U. S. 323, *Pendleton* v. *Benner Line,* 246 U. S. 353, *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139, *Capitol S. S. Co.* v. *Cambria Co.,* 249 U. S. 334, and *Richardson* v. *Harmon,* 222 U. S. 96. Also in the only House of Lords case cited by the Court below—*Tempus Shipping Co.* v. *Louis Dreyfus & Co.,* 40 Lloyds Law Reports 217, 219 (officially reported in L. R. 1931 Appeal Cases 726) Lord Atkin in delivering judgment, said:

> "I have not thought it necessary to deal with

> the decision of the Supreme Court of the United States in *The Irriwaddy*, 171 U. S. 187, because, as pointed out by Greer, *L. J.*, in the Court of Appeal, that case was decided on distinctions then existing between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention."

Lord Atkin was under a misapprehension if he meant to imply that the American law as stated by this Court in *The Irriwaddy*, 171 U. S. 187, has since been changed, either by Act of Congress or by any decision of this Court modifying the law as there laid down. Indeed, later decisions of this Court reiterate the doctrine of *The Irriwaddy*. See

> *The Chattahoochee*, 173 U. S. 540, 554;
> *Knott* v. *Botany Mills*, 179 U. S. 69, 73;
> *The Southwark*, 191 U. S. 1, 6;
> *The Jason*, 225 U. S. 32, 49, 52, 54.

It is, therefore, apparent that there is a recognized distinction between the American and English cases in connection with the point under discussion in the *Tempus* case. A case in the House of Lords in which the facts more closely resemble those in the present case than any of the English cases cited by the Circuit Court of Appeals, is *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.*, L. R. (1915) A. C. 705 (House of Lords), which is not mentioned by the Court below in its opinion, and in which the House of Lords held that the English Fire Statute does not exempt a shipowner from liability for cargo damage from a fire which is caused by unseaworthiness in a case in which proper supervision and inspection by the shipowner in the loading port would have disclosed the unseaworthy condition before the vessel put to sea.

IB.

Congress did not intend by the Fire Statute to authorize shipowners to send obviously and seriously unsafe and unseaworthy ships to sea. But that is precisely what the Circuit Court of Appeals for the Second Circuit has held in this case. We submit that Congress did not intend to relieve shipowners from their personal contractual and non-delegable duty imposed by the maritime law of seeing to it that ordinary care is used in preparing their ships to go to sea from the loading port. Nor did Congress intend by that Statute to permit a shipowner to evade liability for careless performance of that personal duty by any device such as by absenting himself personally from the loading port. Nor did Congress intend by the Fire Statute to authorize shipowners to "delegate" to the crew the performance of the shipowner's personal duty for him at the loading port.

Indeed, this was the very point which was emphasized by the Circuit Court of Appeals for the Fourth Circuit in *Charbonnier* v. *United States,* 45 Fed. (2d) 174, at page 177. During the argument of that case, *Walker* v. *Transportation Co.,* 3 Wall. 150, 153, was much relied upon by counsel representing the shipowner. The Court disposed of this contention by stating that the *Walker* decision was not in point because there was no evidence whatever in that case that the ship was unseaworthy at the beginning of the voyage. That distinction pointed out by the Circuit Court of Appeals for the Fourth Circuit was entirely overlooked by the Circuit Court of Appeals for the Second Circuit in deciding the present case. The Court in the present case erroneously assumed that the warranty of seaworthiness had been breached in the *Walker* case. In so doing the Court not only misapprehended the facts in the *Walker* case, but it

also disregarded the decisions of this Court in *Pendleton* v. *Benner Line, supra,* and in *The Malcolm Baxter, Jr., supra,* that Congress did not intend by the Limitation Act, in cases where there has been a breach of the shipowner's warranty, to exempt shipowners from damages caused by sending vessels to sea which are not seaworthy as far as due diligence can make them so. In *Pendleton* v. *Benner Line,* this Court, in the concluding paragraph of the opinion, said:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether, he must answer for the breach, whether he was to blame for it or not."

The conclusion of this Court in *Pendleton* v. *Benner Line,* is in entire accord with what was later said by this Court in *The Malcolm Baxter, Jr.* Indeed, the very language which the Court below accuses us of having "seized" upon from *The Malcolm Baxter, Jr.* opinion, is merely a restatement of the ground of decision in *Pendleton* v. *Benner Line.* What was there held is the well settled rule of this Court. This Court has consistently held that exemptions or limitations under the Limitation Act or under exceptions contained in a bill of lading, do not protect the shipowner in so far as the damages flow from the unseaworthiness.

The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655;
Pendleton v. *Benner Line,* 246 U. S. 353;
The Malcolm Baxter, Jr., 277 U. S. 323.

None of the cases cited by the Court below as sustaining its position deal with losses caused by unseaworthi-

ness, excepting *The Republic,* 61 Fed. 109 (C. C. A. 2), and in that case, both Courts held the shipowner liable. The District Court held that the breach of warranty precluded the shipowner from the benefits of the limitation statute. The Circuit Court of Appeals in affirming the decision did not find it necessary to consider that question because of its finding that the shipowner could have discovered the unseaworthiness if it had exercised due diligence, and therefore was negligent in not having done so. There is nothing in the decision from which it can be inferred that, when a defect is easily ascertainable at the loading port by an unskilled person, it thought that an owner was entitled to the benefit of the statute in respect of losses caused by the breach of the warranty.

The Court below seems to indicate (R. 787) that our position was that, irrespective of causal connection between the unseaworthiness and the loss, an owner should be held liable. Our printed brief in the court below shows the contrary.

Sailing from the loading port with an observably unsafe condition on board which cannot be remedied by the crew while at sea in the ordinary course of their duties not only constitutes unseaworthiness but also constitutes a personal failure by the shipowner to exercise due diligence to make the ship seaworthy.

International Navigation Co. v. *Farr,* 181 U. S. 218;

Dobell & Co. v. *S. S. Rossmore Co.,* L. R. (1895), 2 Q. B. 408.

Ic.

The Circuit Court of Appeals was under a misapprehension in stating in its opinion that "The parties agree that the fire was the proximate cause of the loss" (R.

p. 786). No such stipulation is in the record or was ever made (unless the Court uses the word "proximate" as the equivalent of "immediate"). The stipulation entered into on November 1, 1929 (R., p. 696), before the respondent disclosed on November 11, 1929 (R., pp. 392, 416, 374) the facts exclusively within its knowledge as to the obviousness of the unseaworthiness before the ship sailed, was in full as follows (R., p. 695):

> "3. All of the merchandise shipped on the S.S. 'Galileo' on the voyage mentioned in the libels sustained some damage from fire occurring on board said steamer and/or water resulting from an effort to put out the fire."

Nothing whatever was said in the stipulation about "proximate cause", which was the issue litigated at the trial. The cargo damage, of course, "followed" the fire, but the fire was only an immediate cause because according to the concurrent findings below, based on evidence introduced by the shipowner in its defense, it resulted inevitably from the real or proximate cause, namely, the obviously unseaworthy and dangerous condition of the vessel on sailing.

The fact that there was an intervening fire resulting inevitably from the unseaworthiness does not make that fire the cause of the loss. The cause of the loss was failure to see to it that ordinary care was used at the loading port to make the vessel safe and fit to go to sea.

In *The G. R. Booth,* 171 U. S. 450, at page 460, the Court said:

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the

plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to."

And again at page 460:

"The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."

In *Royal Exchange* v. *Kingsley Navigation Co.* (1923), Appeal Cases 235, it is said, at page 244:

"Mr. Mather, in his cross-examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, 'Well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water.' Their Lordships cannot doubt that *the unseaworthiness* of the 'Queen City' *was the natural and direct* cause of leakage, sufficient to bring water into contact with the lime cargo, and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that *the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire* within the protection of s. 7. The train of causation, from the unseaworthiness of the 'Queen City' to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A. C. 350, 369, the proxi-

mate cause of a loss is not necessarily the cause nearest in time.

The question of onus is not material in these circumstances; but if a shipowner seeks to escape liability, on the ground that the loss arose from fire, the onus of showing that the loss did arise from fire is affirmatively upon him." (Italics ours.)

The subsequently-occurring "fire" was the natural and probable consequence of the breach of contract. To contend that such fire is the "cause" of the damage is to argue that an effect can be the cause of the cause which produces the effect.

On the facts concurrently found by the courts below, the fire and consequent cargo damage were inevitably caused by the respondent's personal breach of warranty. The duty of supplying a vessel which is reasonably safe for the voyage is that of the shipowner and not of the ship's crew.

The Courts below assumed that, since conceivably an owner of an unseaworthy vessel might be entitled to the benefit of the Fire Statute when the unseaworthiness had nothing to do with causing the fire, therefore in all cases, even where the fire is caused directly by the breach of warranty, the shipowner should be exonerated from liability. For instance, the opinion of the Circuit Court of Appeals is devoted almost entirely to a discussion of the question whether or not seaworthiness was a *condition precedent* to exoneration in any conceivable case under the Fire Statute.

The Circuit Court of Appeals in the present case clearly overlooked the significance of its finding (in accord with that of the District Court) that the fire and consequent cargo damage resulted "inevitably" (R., p. 786, Opinion, C. C. A. 2) from the grossly unseaworthy condition of the "Galileo" on sailing. In so doing it failed to apply the doctrine in *Pendleton* v. *Benner Line*

(*supra*) and *The Malcolm Baxter, Jr.* (*supra*), that the breach of warranty in failing to provide a vessel which was seaworthy on sailing so far as due diligence could make her so was personal neglect. The entire opinion of the Circuit Court of Appeals down to the last paragraph on page 789 of the record, is devoted to discussing a question which is not involved here, viz; whether an owner of an unseaworthy ship is entitled to the protection of the Fire Statute when a fire and consequent cargo damage do NOT result from the neglect to make her seaworthy and safe from fire so far as ordinary care could make her so. The Court seems to have been confused by the decisions which hold that "due diligence to make seaworthy" under Section 3 of the Harter Act is a condition precedent to exemption from perils not resulting from unseaworthiness and to have overlooked the fact that the warranty existed long before the Harter Act existed.

The loss here resulted "inevitably" from the unseaworthiness. In other words in the present case no fortuitous fire or peril was encountered; the loss was "inevitable" from the dangerous condition on sailing. All that the Circuit Court of Appeals considered in reaching its erroneous conclusion was a question which is not involved here. It is only in the last two paragraphs (R., pp. 789-790) of its opinion that the Circuit Court of Appeals discusses the neglect of the shipowner. It then omits to mention the most important fact in the case, viz; that on its concurrent findings of fact already made the cargo damage resulted inevitably from the unseaworthiness and dangerous fire hazard existing on sailing, and that they were observable by an unskilled man. On this finding the shipowner as a matter of law was guilty of personal neglect in failing to comply with his personal warranty that on sailing the vessel would be seaworthy so far as due diligence could make her so.

II.

The decision in this case is in conflict with the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, which the Circuit Court of Appeals in the present case endeavors in its opinion to distinguish as follows (R. 789):

> "In the case of *The Malcolm Baxter, Jr.*, as appears from the decision of the district court (not officially reported), the vessel's hull had defects which an inspection would have disclosed but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any waranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity'. So understood the case is quite in line with earlier authorities. In the case at bar, however, the lack of diligence was that of the chief engineer and the owner was not only not in privity with the engineer's default but was found by the court to be free from personal neglect. Therefore, 'The Malcolm Baxter' would not be inconsistent with allowing limitation under section 4283, and is even less inconsistent with allowing exoneration under section 4282."

The Circuit Court of Appeals attempted in its opinion to distinguish this case on the facts from that of *The Malcolm Baxter, Jr.*, 277 U. S. 323, so as to sustain a proposition of law which it laid down in its opinion as follows:

> "Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy, is, therefore, immaterial unless it is within the owner's privity or knowledge" (R., pp. 788, 789).

The language just quoted, in so far as it purports to cover a case in which the shipowner has breached his personal contract that the vessel on sailing will be seaworthy so far as due diligence can make her so, is flatly in conflict with the decisions of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139 and *Richardson* v. *Harmon*, 223 U. S. 96.

In *The Malcolm Baxter, Jr.*, 277 U. S. 323, at page 331, this Court said:

> "Both courts below agreed that the 'Baxter' was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and Acts permitting limitation of liability to the vessel and pending freight. R. S. Sections 4282-4289."

In *Pendleton* v. *Benner Line*, 246 U. S. 353, at page 357, this Court said:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not."

In *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, at page 149, this Court said:

> "But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. *Pendleton* v. *Benner Line*, 246 U. S. 353."

In *Richardson* v. *Harmon*, 223 U. S. 96, at page 106, this Court said:

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect *and contracts.*" (Italics ours.)

This entire subject has been under a full discussion in this Court, not only in *Pendleton* v. *Benner Line*, but also in *Luckenbach* v. *McCahan Sugar Company*, as a reference to the opinions of the District Court, Hough, *J.*, and the Circuit Court of Appeals in the *Luckenbach* case will show. (See *The Julia Luckenbach*, 235 Fed. 388, for the District Court's opinion, page 389; for the Circuit Court of Appeals opinion, p. 396.)

The attempt of the Court below to distinguish the *Malcolm Baxter, Jr.* case on the facts is not justified. The reference in its opinion (R., p. 789) to an absence of a warranty of seaworthiness in the bill of sale, is wholly immaterial, because the suit in the *Malcolm Baxter, Jr.* case was on a contract of affreightment, and not on the bill of sale. Any warranty in the bill of sale can have no greater evidential effect in a suit for breach of a contract of affreightment than a certificate of seaworthiness. Indeed, it would not be of as much probative value as a certificate of seaworthiness, because the warranty in the bill of sale is that of an owner, who would not necessarily be a skilled person, whereas, a certificate of seaworthiness is a statement of a skilled person. But it is settled by a long line of authorities that certificates of seaworthiness are not proof of due diligence. See *Bank Line* v. *Porter*, 25 Fed. (2d) 843 (C. C. A. 4), where the authorities are collected.

The Circuit Court of Appeals says (R., p. 789) that:

> "In the case of *The Malcolm Baxter, Jr.*, as appears from the decision of the District Court (not officially reported), the vessel's hull had defects which an inspection would have disclosed and the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's and the loss resulting from unseaworthiness was within the owner's 'privity'."

The Court thus mistakenly assumed that in the *Malcolm Baxter, Jr.* case there was no survey of the vessel before she sailed from New Orleans. But that there was such survey appears from the opinion of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. at page 332 (and from numerous places in the Record in that case), where this Court said:

> "Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a 'hog' or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence."

It is abundantly clear from the foregoing quotation that this Court in the *Baxter* case fully understood that there had been a survey before the vessel sailed from New Orleans and that in using the language criticised by the Court below, this Court used such language with that fact in mind. The Court below also overlooked the fact that in its opinion the District Court in the *Baxter* case found that a surveyor of the New Orleans Board of

Underwriters granted a certificate of loading and that a surveyor, called Thompson, also looked over the vessel. The District Court found that Thompson's survey was not as careful as it should have been. It said: "The chances are good that the defects would have been found at New Orleans had anyone cared enough to look for them." (See the Record in the *Malcolm Baxter, Jr.* case, on file in this court, October Term, 1927, No. 459, Volume I of the Transcript of Record, at pp. 241-243.) The fact is, therefore, that the amount of diligence exercised by the owner in the *Malcolm Baxter, Jr.* case was greater than the diligence exercised by the respondent here. In addition, in the *Malcolm Baxter, Jr.* case, the owner was held liable because its surveyor did not make as careful an examination as he should, whereas here, the Chief Engineer knew of the dangerous condition before the ship sailed.

The respondent should have had in mind that the coal which had been in its ship would involve the risk of fire. In *Fiumana* v. *Bunge,* L. R. (1930), 2 K. B. 47, it is said (at p. 60):

> "The practice of carrying bunkers on the voyage out and back may always I think involve this risk of fire. * * *
>
> In the present case the possibility of coal deteriorating before the grain is loaded cannot be absent from the shipowner's mind. I imagine the practice of bunkering in this way is adopted from motives of economy."

In *The Malcolm Baxter, Jr.,* 277 U. S. 323, at page 331, this Court said:

> "Both courts below agreed that the 'Baxter' was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient

> ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and Acts permitting limitation of liability to the vessel and pending freight. R.S. Sections 4282-4289."

As R.S. 4282, the Fire Statute, is part of the same Act as R.S. 4283, the limitation statute, the two sections should receive the same construction. Moreover, the reasoning followed by the courts in denying the benefits of Section 4283 to an owner who has breached his warranty of seaworthiness, applies with even greater froce to a case where a shipowner seeks the benefit of the Fire Statute to avoid liability for a fire which resulted from his breach of an express warranty of seaworthiness. In *La Bourgogne,* 210 U. S. 95, this Court pointed out that the Limitation Statute is more favorable to the shipowner than the Fire Statute. Discussing the previous rulings in *Providence & N. Y. S.S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, this Court said (210 U. S. at p. 122):

> "In determining the case it became necessary to decide whether, if there was negligence of the owner of a vessel in case of fire within the meaning of the first section of the act of 1851, such negligence was the necessary equivalent of privity and knowledge of the owner, as expressed in the third section of the act. It was held that the two provisions were not necessarily coterminous, that negligence under the first section of the act might exist so as to prevent the unqualified limitation given by that section, and yet the owner of the vessel be entitled to the more limited exemption given by the third section, which depended upon the absence of privity or knowledge. In other words, it was decided that although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner."

Under such circumstances as those here presented, we submit that the vessel owner is precluded from securing the benefits of the Fire Statute (R. S. 4282) which is part of the same Act as R. S. 4283 (Act of March 3, 1851) dealing with a carrier's right to a limitation of liability. It is well settled that a shipowner will not be afforded a limitation of his liability under the provisions of R. S. 4283 where a loss is caused by breach of the terms of his personal contract. *Richardson* v. *Harmon*, 222 U. S. 96; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139; *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334. This Court held in three of the foregoing cases that the charter parties involved, containing an express warranty of seaworthiness, were the personal contracts of the owners.

In *The Loyal*, 204 Fed. 930 (C. C. A. 2), and *The Katie*, 24 Fed. 2nd 410 (C. C. A. 3), it was held that breach of the warranty of seaworthiness implied by law in the contract of the parties, took from the owner the right to limit his liability against losses arising from the unseaworthiness.

III.

Conflict with the Ninth Circuit as to "delegability".

The decision in this case of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Bethlehem Co.* v. *Gutradt Co.*, 10 Fed. (2d) 769. In that case the Gutradt Company, as cargo owner, sued the Pacific Mail Company, as vessel owner, for cargo

damage. The negligent act of a repairman, an independent contractor, employed by the vessel owner, in repairing a clapper valve, which became below the water line when cargo was loaded, caused water to enter the holds and damage the cargo. The shipowner contended that he had delegated that duty of preparing the vessel for sea to the repairman and the ship's officers. The repairman contended that the cargo "damage was caused by the negligence of the owner in failing to inspect the valve before loading the cargo" (10 Fed. 2d at p. 772). The Court said (10 Fed. 2d at p. 771):

> "As between the Pacific Mail Company and the Gutradt Company, the duty of making the ship seaworthy *was a nondelegable one.*" (Italics ours.)

IV.

The *duty* of the shipowner was to perform his warranty that due diligence would be used to supply a seaworthy ship. The Fire Statute, like exceptions in a contract of carriage, limits the *liability* for damages from causes beyond the shipowner's control, but does not limit the *duty* of the owner to use care to supply a seaworthy ship. Indeed, an attempt by contract to reduce that duty below the use of due diligence would be illegal by Section 2 of the Harter Act.

In *The Caledonia,* 157 U. S. 124, this Court said (at p. 137):

> "As is well said by counsel for the appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner and do not in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel."

And in *The Malcolm Baxter, Jr.*, 277 U. S. 323, at page 331, this Court said:

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa* (1908), page 84; *Thorley* v. *Orchis S. S. Co., Ltd.* 1907), 1 K. B. 660; *Kish* v. *Taylor* (1912), A. C. 604, 618."

And in a later passage this Court said:

> "But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover. *The Caledonia, supra*" (p. 333 of 277 U. S.).

The unseaworthiness, which was concurrently found by the Courts below, displaced the contract of affreightment in so far as damage was caused by the unseaworthiness.

The effect of the decisions of this Court in the *Malcolm Baxter* case, *supra*, and in *Pendleton* v. *Benner Line*, 246 U. S. 353, is to place an exoneration from or limitation of liability by statute in the same category as a limitation of liability by contract in so far as losses caused by breach of the warranty of seaworthiness are concerned.

This Court in the *Malcolm Baxter* case did not find it necessary to go beyond the principle laid down in *The Caledonia* that an exemption from liability does not protect a shipowner from the consequences of a breach of duty in failing to use "due diligence" (277 U. S., p. 331) to make his ship seaworthy at the loading port. This failure was treated by this Court as a personal neglect which deprived the shipowner of the benefit of the limitation statute.

In addition to the warranty of seaworthiness implied by the maritime law in every contract of affreightment (*The Edwin I. Morrison,* 153 U. S. 199), all of the bills of lading in the present case which were signed by the respondent (or issued in its name by its New York agents pursuant to general authority given by the respondent, R., p. 698), provide that the petitioners' goods would "be transported by the *good* steamship 'Galileo'" (R. 698), and that "the carrier shall not be liable, as carrier or otherwise, for any loss * * * by * * * unseaworthiness of the steamer, whether existing at time of shipment or at the beginning of the voyage, provided *the owners* have *exercised due diligence to make the steamer seaworthy*" (R. 698). (Italics ours.)

The bill of lading provisions quoted form an unequivocal agreement between the parties concerning their rights and liabilities and that agreement, not being contrary to any public policy, entirely displaces any statutory benefit which the carrier would otherwise have had under R. S. 4282. The bills of lading contain a clause reading as follows:

> "It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes" (R. p. 698).

This clause does not indicate the slightest intention to modify the warranty of seaworthiness. Such an intention must be in clear and unambiguous words. *The Caledonia,* 157 U. S. 124; *The Carib Prince,* 170 U. S. 655. Indeed, the clear intent of the clause is that the warranty should in no event be considered modified

further than is permitted by the Harter Act, which is referred to in the class as "the Act of Congress of the United States, approved on the 13th day of February, 1893." The warranty, therefore, remains in full force and effect, except in so far as it was modified by the bill of lading exception of loss from unseaworthiness provided the owners have exercised due diligence to make the vessel seaworthy.

The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655;
The Malcolm Baxter, Jr., 277 U. S. 323.

The Fire Statute, R. S. 4282, is not mentioned in the clause. As clauses in bills of lading are strictly construed against the shipowner—*Calderon* v. *Atlas S. S. Co.,* 170 U. S. 272—and particularly, as clauses tending to reduce the shipowner's duty to furnish a seaworthy ship may not be enlarged by inference, the inclusion of R. S. 4282 in the clause may not be had by implication.

The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655.

The principle of "personal contract" applies here. The respondent being a corporation was required, of course, to act through an agent, and the respondent's own uncontradicted evidence is that these bills of lading were executed or authorized by its duly authorized New York agents (R., pp. 422-423). The doctrine of "personal contract" was applied in the following cases where the contracts were executed by agents:

The Etna Maru, 33 Fed-2d-232, p. 233 CCA 5
Luckenbach v. *McCahan Sugar Co.,* 248 U. S. 139;
Great Lakes Towing Co. v. *Mill Transp. Co.,* 155 Fed. 11 (C. C. A. 6);

American Co. v. *Davison Lumber Co.*, 240 Fed. 126 (C. C. A. 2);
Gokey v. *Fort*, 44 Fed. 364 (S. D. N. Y.).

In *The Soerstad*, 257 Fed. 130 (S. D. N. Y.), Judge Learned Hand (now Judge of the United States Circuit Court of Appeals for the Second Circuit), referring to the effect of an express warranty in a contract on the warrantor's right to limitation, said (at p. 130):

> "A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally a pure action of tort' (Ames, History of Assumpsit, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B., 11 Ed. IV, 6, plac. 11), and it was not till 1778, in *Stuart* v. *Wilkins*, 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.
>
> Regarded in this way, which is probably the correct way historically, it follows inevitably that a breach of warranty should be held to be with the warrantor's privity, because all the elements of the cause of action are 'done, occasioned, or incurred' by him personally; that is to say, he

> personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the mistaken reliance, as he knows it will. *Thus he personally occasions the loss.*" (Italics ours.)

In *Richardson* v. *Harmon*, 222 U. S. 96, a petition was filed by the owners of a barge to limit their liability under Section 4283 for damage occasioned by a collision of their barge with an abutment of a railroad drawbridge. This Court carefully considered the history and purpose of the Limited Liability Act and its amendments, and in the course of the opinion said (at p. 106):

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

IV.

The decision is in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Tucker Co.* v. *Southwark Co.*, 24 Fed. 2nd 410, and of this Court in *The Wildcroft*, 201 U. S. 378, *The Caledonia*, 157 U. S. 124, *Pendleton* v. *Benner Line*, 246 U. S. 353, and in *Luckenback* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, that a general statutory or contractual exemption from liability for damage during the contract period from a cause beyond the shipowner's personal control does not exempt him from damages for breach of his personal warranty or representation of fact, made at the time he signs the contract, that at that time due diligence has in fact been exercised by him and his servants to make his vessel seaworthy, and that such diligence will continue until the vessel sails from her loading port.

Conclusion.

This Court should issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the cause of *Earle & Stoddart, Inc., et als.*, v. *Ellerman's Wilson Line, Ltd., Owner of S. S. "Galileo".*

Dated, New York City, March 17, 1932.

Respectfully submitted,

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